Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 78-1451

JAMES J. McCOY, EILEEN R. RASULIS,

Plaintiff-Appellants,

vs.

JOSEPH A. CALIFANO, as Secretary of the Department of Health, Education and Welfare,

and

PAUL Q. PETERSON, as Director of the State of Illinois Department of Public Health,

Defendants-Appellees.

JURISDICTIONAL STATEMENT

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No. .....

JAMES J. McCOY, EILEEN R. RASULIS,

Plaintiff-Appellants,

vs.

JOSEPH A. CALIFANO, as Secretary of the Department of Health, Education and Welfare,

and

PAUL Q. PETERSON, as Director of the State of Illinois Department of Public Health,

Defendants-Appellees.

JURISDICTIONAL STATEMENT

TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE AND TO THE ASSOCIATE JUDGES OF THE SUPREME COURT:

JAMES J. McCOY AND EILEEN R. RASULIS, PLAINTIFF-APPELLANTS hereby petition the United States Supreme Court to accept jurisdiction of this appeal in the above entitled action.

STATEMENT OF THE CASE

These Civil Actions were initiated in the United States District Court for the Northern District of Illinois, Eastern Division. A Jury Trial was demanded for both actions, but we were denied that right. The actions were dismissed in the District Court, an appeal was made to the United States Court of Appeals for the Seventh Circuit. We were denied our request for Oral Argument and the dismissal was affirmed in an unpublished order (See Order appended hereto).

These actions were brought against the named Defendants in as much as they have denied the Plaintiffs the Equal Protection of the Law and the District Court and Appellate Courts have denied the Plaintiffs their Constitutional Right of a Jury Trial.

STATEMENT OF THE FACTS

The questions presented for review are:

1. Are the Plaintiffs being denied the Equal Protection of the Law?
2. Do the Defendants and the Courts have the right to deny the Plaintiffs a Jury Trial or a hearing to enable them to present evidence substantiating on their claims?

1. The Equal Protection has been deemed to be three fold. We were forced to concede that 42 U.S.C. 1395 *et seq,* (the Medicare Act) meets the first two requirements (this includes the statute aforestated 20 C.F.R. 405.1032(3); that the regulation is a rational one and that it furthers a governmental purpose. The purported governmental purpose was to provide quality care for Medicare recipients.

The Defendants have ignored the third part of the equal protection test "whether all persons within the classes are treated equally". This was the heart of the matter before the Court. Plaintiffs are being denied the Equal Protection of the Law. The Plaintiffs herein had filed a previous action against the Secretary of the Department of Health, Education and Welfare, *Rasulis et al* v. *Weinberger,* 502 F. 2nd 1006 (1974). The other physical therapists in the aforestated action, and their employing institutions are situated in the exact same positions as the Plaintiffs. The only difference is that all of the other Plaintiffs in Rasulis, supra, submitted to an examination given by the Defendants and failed it; whereas, McCoy refused to take the examination because members of the American Physical Therapy Association were not required to take the examination.

The regulation promulgated by Defendant Califano states who and under what conditions an individual or institution

can participate in the Medicare program. If the qualifications are not met, neither the Physical Therapist nor the facility employing him is eligible to participate in the Program. There is only black and white, there are no gray areas as the Defendants wish the Courts to believe, except in the case of McCoy and Rasulis. All other Plaintiffs and their employing Medicare facilities are treating patients under the Medicare Program and being reimbursed except McCoy and Rasulis. The Defendants herein named are specifically and intentionally discriminating against us.

Every year, the Illinois Department of Public Health as an agent for the Department of Health, Education and Welfare inspects each and every Medicare facility. The credentials of all licensed individuals are reviewed. This is a Congressional Mandate. The set of facts that we are trying to submit is that the Defendants are deliberately excluding Plaintiffs from the Medicare Program, while including the other Plaintiffs in the aforementioned *Rasulis,* supra action.

In *Skinner* v. *State of Oklahoma,* 62 S. Ct. 1110 at 1113, 316 U.S. 535 (1942) it states "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense, and sterilizes one and not the other, it has made "a discrimination" as invidious as if a particular race or nationality has been selected for oppressive treatment." The Defendants are allowing others similarly, or more precisely, exactly situated, to participate in the Program and be reimbursed and not the Plaintiffs herein.

The Defendants have claimed that they have the right of "selectivity of enforcement" which in essence was an admission that they were treating us in a manner that is different than others in the same class. In the *Rasulis,* supra, action the United States Court of Appeals for the Seventh

Circuit stated in its findings that "For a hospital or other health care institution to participate in the program, its personnel involved in the treatment of Medicare patients must qualify under the regulation". The regulation leaves no right of "selectivity of enforcement" nor does the ruling of the Appellate Court, but yet all others are practicing and being reimbursed under the Medicare program. In *Snowden* v. *Hughes,* 321 U.S. 1, 10 (1944) the Court stated that "uneven or erroneous application of an otherwise valid statute constitutes a denial of equal protection only if it represents intentional or purposeful discrimination". As quoted in *Skinner,* supra, the law when it lays an unequal hand has made a "discrimination" In *Atchison, Topeka and Santa Fe Railroad Co.* v. *Mathew,* 174 U.S. 96, 19 S. Ct. 609. "The Equal Protection guaranteed by the Constitution forbids the selection of a person, natural or artificial and impose upon him or it burdens and liabilities which are not cast upon others similarly situated." This is exactly what the Defendants have done to McCoy and Rasulis.

2. The Plaintiffs filed this action in the District Court and it was dismissed. The Plaintiffs were not afforded an opportunity to establish or prove their claim. There was no Jury Trial as demanded or even a hearing, to afford the Plaintiffs an opportunity to establish or prove their claims. The District Court in *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974) dismissed the action upon merely the Defendants Motion to Dismiss, and the Court stated "The District Court acted prematurely and hence erroneously in dismissing the Complaints as it did without affording Petitioners any opportunity by subsequent proof to establish their claims."

No determination can be made upon an action without hearing evidence or at least affording the Plaintiffs an op-

portunity for the evidence to be heard. "The issue is not whether a Plaintiff will ultimately prevail, but whether the Plaintiff is entitled to offer evidence to suppor their claims. *Scheuer, supra.*

It is not the normal course of a civil action for Plaintiffs to include with their Complaints all the evidence necessary to prove their allegations. In *Lee* v. *Hodges,* 321 F. 2d 480, "On Motion to Dismiss for failure to state a cause of action, Plaintiff especially one appearing pro se, is entitled to all reasonable presumptions". Also in *Scheuer* v. *Rhodes, supra,* "The complaining parties are entitled to be heard more fully than is possible in a Motion to Dismiss a Complaint", and also "We intimate no evaluation whatever on the merits of the petitioners claims as to whether it will be possible to support them by proof. We hold only that, on the allegations of their respective complaints, they were entitled to have them judicially resolved.

Plaintiffs are requesting an opportunity to present evidence to support their allegations.

The Plaintiffs feel that these actions require review by the Supreme Court inasmuch as we have demanded a Jury Trial but were refused same. Our Complaints were dismissed without being able to present any evidence to substantiate our claims. The Federal judicial system should not work on such a superficial basis and when the Defendants are governmental agencies there should be more of an effort on the part of the Courts to be unbiased.

JURISDICTION ON APPEAL

These actions are civil in nature and are brought pursuant to 28 U.S.C. 1331(a), that there is a Federal question involved. The actions were taken to the United States Court of Appeals for the Seventh Circuit from the District Court for the Northern District of Illinois, Eastern Division. The Appellate Court reaffirmed the dismissal on September 13, 1978, and the rehearing was denied on October 12, 1978. A Notice of Appeal was filed with the United States Court of Appeals for the Seventh Circuit on October 31, 1978.

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1331(a), 1361 and 1391(e) and 5 U.S.C. 702-706. "The United States Supreme Court has appellate jurisdiction in all cases arising under the Constitution and laws of the United States." *Cohens* v. *Com. of Va.,* 19 U.S. 264, and "where case is properly before the Supreme Court on Constitutional grounds, the jurisdiction of that Court extends to review of all cases". *James-Dickinson Farm Mort. et al* v. *Harry,* 47 S. Ct. 309 and also *Chaloner* v. *Sherman,* 242 U.S. 455, 37 S. Ct. 136.

The Defendants are denying the Plaintiffs the Equal Protection of the Law in the manner in which they are enforcng the following regulation:

20 C.F.R. 405.1032(3)

If physical therapy services are offered, the services are given by or under the supervision of a qualified physical therapist. A qualified therapist is one who:

(i) Has graduated from a physical therapy curriculum approved by—

(a) The American Physical Therapy Association; or

(b) The Council on Medical Education and Hospitals of the American Medical Association; or

(c) The Council of Medical Education of the American Medical Association in collaboration with the American Physical Therapy Association; or

(ii) Prior to January 1, 1966—

(a) Has been admitted to membership by the American Physical Therapy Association; or

(b) Has been admitted to registration by the American Registry of Physical Therapists; or

(c) Has graduated from a physical therapy curriculum in a 4 year college or university approved by a State Department of Education, is licensed or registered as a physical therapist, and where appropriate, has passed a State examination for licensure as a physical therapist; or

(iii) If currently licensed or registered to practice physical therapy pursuant to State law;

(a) Was licensed or registered prior to January 1, 1966 (and prior to January 1, 1970, grade through examination conducted by or under the sponsorship of the Public Health Service; or

(b) Was licensed or registered prior to January 1, 1966 (and prior to January 1, 1970, had 15 years of fulltime experience, in the treatment of illness or injury through the practice of physical therapy in which he rendered services upon the order of and under the direction of attending and referring physicians.

(iv) If trained outside of the United States—

(a) Has graduated since 1928 from a physical therapy curriculum approved in the country in which the curriculum was located and in which there is a member organization of the World Confederation for Physical Therapy; and

(b) Is a member or a member organization of the World Confederation for Physical Therapy; and

(c) Has completed 1 year experience under the supervision of an active member of the American Physical Therapy Association; and

(d) Has successfully completed a qualifying examination as prescribed by the American Physical Therapy Association.

We are praying this Court for an opportunity to present evidence to a competent Court of Law so that our allegations can be given a fair and proper trial. It has been evident by the Court findings that they were trying to avoid ruling on the case. The major questions in the suit were avoided by the Courts.

WHEREFORE, Plaintiff-and Appellants respectfully request that this Court accept jurisdiction of plaintiff's appeal in the above captioned matter.

JAMES J/ McCOY, PRO SE
EILEEN R. RASULIS, PRO SE

SCHEDULE OF APPENDICES

APPENDIX A. ORDER UNITED STATES COURT OF APPEALS SEPTEMBER 19, 1978.

APPENDIX B. ORDER UNITED STATES COURT OF APPEALS OCTOBER 12, 1978.

APPENDIX C. NOTICE OF APPEAL OCTOBER 31, 1978.

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Submitted: September 13, 1978
September 19, 1978
Before
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

Nos. 78-1422, 78-1425 EILEEN R. RASULIS and JAMES J. McCOY, *Plaintiffs-Appellants,* vs. JOSEPH A. CALIFANO, etc., and PAUL Q. PETERSON, etc., *Defendants-Appellees.*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. Nos. 77-C-1094, 77-C-1095 Judge Crowley

ORDER

The issue for review is whether the district court properly dismissed plaitiffs' pro se complaints for failure to state a claim upon which relief can be granted.

Plaintiffs-appellants, James J. McCoy and Eileen R. Rasulis (plaintiffs or McCoy and Rasulis), filed pro se complaints claiming denial of equal protection of the laws by reason of defendants-appellees', Joseph A. Califano and

Paul Q. Peterson (defendants), decision not to certify plaintiffs for participation in the federal Medicare program as providers of physicial therapy services, while granting such certification to other individuals and institutions which are as equally unqualified to participate as plaintiffs. The district court granted defendants' motions to dismiss the complaints for failure to state a claim upon which relief can be granted, and plaintiffs appeal.

In determining whether "beyond doubt that the plaintiff[s] can prove that no set of facts in support of [their] claim which would entitle [them] to relief," *Conley* v. *Gibson,* 355 U.S. 41, 45-46 (1957) (citations omitted), plaintiffs are entitled to a liberal interpretation of their complaint when proceeding pro se. *Haines* v. *Kerner,* 404 U.S. 519 (1972). On a motion to dismiss, all the factual allegations made in the complaint must be taken as true. *Cooper* v. *Pate,* 378 U.S. 546 (1964).

Plaintiffs' respective complaints claim defendants "specifically and purposefully discriminated" against them by refusing to permit their participation in the Medicare program although other unqualified providers of services are allowed to participate. McCoy and Rasulis do not claim they are eligible to participate since this court earlier upheld a determination that they are not qualified. *Rasulis* v. *Weinberger,* 502 F. 2d 1006 (1974).

Plaintiffs' complaints do not allege that their selection for non-participation "was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore[,] grounds supporting a finding of a denial of equal protection were not alleged." *Oyler* v. *Boles,* 368 U.S. 448, 456 (1962) (citations omitted); *United States* v. *Neary,* 552 F. 2d 1184, 1195 (7th Cir. 1977). Absent an allegation of selective enforcement based on

some "unjustifiable standard" as described in *Oyler,* no claim of a violation of equal protection can be made out. This result is not changed even if, as the plaintiffs assert, some allegedly unqualified individuals and institutions are allowed to participate, contrary to the Medicare regulation (20 C.F.R. 405.1031(d)(3) and to this Court's observation in *Rasulis* v. *Weinberger, supra,* 502 F. 2d at 1008, that "for a hospital or other health care institutution to participate in the program, its personnel involved in the treatment of Medicare patients must quality under the regulation." The fact remains that plaintiffs have not attributed their exclusion to the application to them of an unjustifiable standard or arbitrary classification. McCoy and Rasulis confuse their claim of unequal treatment with the right to equal protection of the laws, the latter serving as a catalyst for relief when the unequal treatment complained of is the result of an unjustifiable standard or arbitrary classification without any rational basis or objective; and the former, without more, simply incapable of serving as a basis for any relief.

We agree with the district court that plaintiffs have not alleged such facts as to state a redressable claim under federal law, and any discovery proceedings or hearing, given the circumstance, would have served no useful purpose.

Defendant-appellee Califano's motion to affirm without oral argument made pursuant to Circuit Court Rule 15 is granted, and the district court's judgment of dismissal in each case is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
October 12, 1978
Before
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

Nos. 78-1422, 1425 EILEEN R. RASULIS and JAMES J. McCOY, *Plaintiffs-Appellants,* **vs.** JOSEPH A. CALIFANO, etc., and PAUL Q. PETERSON, etc., *Defendants-Appellees.*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. Nos. 77-c-1094, 1095. John Powers Crowley, Judge.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by plaintiffs-appellants, all of the judges in the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

UNITED STATES SUPREME COURT

JAMES J. McCOY, EILEEN R. RASULIS, *Plaintiff-Appellants,* vs. JOSEPH A. CALIFANO, AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, AND PAUL Q. PETERSON, AS DIRECTOR OF THE STATE OF ILLINOIS, DEPARTMENT OF PUBLIC HEALTH, *Defendant-Appellees.*	U.S.C.A. - 7th Circuit. Received in Clerk's Office Oct. 31, 1978 Thomas F. Strubbe, Clerk. Nos. 78-1422, 78-1425 Appealed from the United States Court of Appeals, Seventh Circuit.

NOTICE OF APPEAL

Notice is hereby given that JAMES J. McCOY and EILEEN R. RASULIS, the plaintiffs above named, hereby appeals to the Supreme Court of the United States from dismissal of Petition for Rehearing, entered in this action on October 12, 1978.

This appeal is taken pursuant to 5 U.S.C. 702-706, 28 U.S.C. 1331(a), 1361, and 1391(e).

DATED: .....

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Supreme Court, U. S.
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No. 78-1451

In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES J. MCCOY AND EILEEN R. RASULIS, APPELLANTS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION AND WELFARE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE FEDERAL APPELLEE TO DISMISS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1451

JAMES J. McCOY AND EILEEN R. RASULIS, APPELLANTS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION AND WELFARE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE FEDERAL APPELLEE TO DISMISS

Appellants seek review of a judgment that their complaint did not state a claim on which relief could be granted (J.S. App. A1-A3). No statute provides jurisdiction for an appeal to this Court from such a judgment. 28 U.S.C. 1252 does not apply because neither the district court nor the court of appeals declared an Act of Congress to be unconstitutional. 28 U.S.C. 1253 does not apply because the case was not required to be heard by a three-judge district court. The other statutes on which appellants rely (J.S. 7) do not pertain to the jurisdiction of this Court.* The appeal accordingly should be dismissed for want of jurisdiction, and the papers

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*Some of the statutes do not pertain to the jurisdiction of any court. 28 U.S.C. 1391(e) concerns venue rather than jurisdiction, and the Administrative Procedure Act, 5 U.S.C. 702-706, does not grant jurisdiction. *Califano* v. *Sanders*, 430 U.S. 99 (1977).

whereon the appeal is taken should be treated as a petition for a writ of certiorari. 28 U.S.C. 2103.

The Court should deny the petition because it is jurisdictionally out of time. The judgment of the court of appeals was entered on September 19, 1978, and a petition for rehearing was denied on October 12, 1978 (J.S. App. B1). The 90 days provided by 28 U.S.C. 2101(c) within which to file a petition for a writ of certiorari expired on January 10, 1979. The petition was not filed until January 17, 1979, and is thus out of time.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979

DOJ-1979-03